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Strumsky v. San Diego County Employees Retirement Association: Determining the Scope of Judicial Review of Administrative Decisions in California

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STRUMSKY v. SAN DIEGO COUNTY EMPLOYEES RETIREMENT ASSOCIATION: DETERMINING THE SCOPE OF JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS IN CALIFORNIA

Since 1936, the California Supreme Court has taken a distinctive approach to the right to judicial review of an administrative decision. The scope of review is determined by two factors: the type of agency whose decision is being appealed;[1] and the nature of the right asserted by the party seeking review. The general rule, evolved from a long series of cases, is that if the agency does not have the authority to exercise judicial power and if its decision affects a fundamental vested right, then the trial court reviewing that decision is entitled to weigh the evidence and to make an independent judgment on the evidence. In all other instances, the trial court must apply the "substantial evidence" test; that is, the court's role is limited to a determination of whether the agency's findings are supported by substantial evidence in light of the whole record.

In its most recent decision on this point, *Strumsky v. San Diego County Employees Retirement Association*,[2] the supreme court abolished the long established distinction between state and local agencies by deciding that local agencies do *not* have the power to perform judicial functions. The result is that the decisions of local administrative agencies cannot automatically be given judicial weight by a reviewing court. Whenever the local agency's decision affects a fundamental vested right, the reviewing court must make an independent judgment on the evidence.[3]

This article will analyze the *Strumsky* decision against its historical background, examine the theoretical problems with the court's consti-

1. The California Supreme Court has defined four classes of administrative agencies: state agencies of statewide jurisdiction created by the legislature; local agencies created by city, county, or other local governments; state agencies of limited territorial jurisdiction which therefore are considered to be "local" agencies; and constitutional agencies, created by and deriving their powers from the California Constitution. W. DEERING, CALIFORNIA ADMINISTRATIVE MANDAMUS §§ 3.3, 5.66-.68 (1966) [hereinafter cited as DEERING].

2. 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (1974).

3. *Id.* at 32, 520 P.2d at 31, 112 Cal. Rptr. at 807.

tutional arguments, and consider the practical effects of the new rule.

Summary of Strumsky v. San Diego County Employees Retirement Association

Mrs. Strumsky is the widow of a San Diego County employee who was a member of the defendant retirement association.[4] As a surviving spouse, Mrs. Strumsky applied to the retirement board of the defendant agency for the service-connected death allowance established by section 31787 of the California Government Code, a sum considerably greater than the normal death allowance established by section 31781.1 of that code.[5] The retirement board held a hearing to determine the cause of death and concluded that Mr. Strumsky did not die from a service-connected disease or injury.

The plaintiff widow sought a writ of administrative mandate, pursuant to section 1094.5 of the California Code of Civil Procedure, to set aside the board's decision. The trial court denied the writ on the ground that the board's findings were supported by substantial evidence in light of the whole record. Nonetheless, the trial court made a supplemental finding that, had it been authorized *by law* to exercise its independent judgment on the evidence, it would have found that the death was service connected.[6]

The court of appeal reversed the decision on the ground that the language of *Bixby v. Pierno*,[7] a 1971 supreme court decision defining the scope of judicial review of the findings of state agencies, implies that a uniform rule should be applied to state and local agencies.[8] The

4. County retirement boards are local agencies. The County Employees Retirement Law of 1937 authorizes county governments to establish retirement systems for their employees and sets forth the rules which govern the maintenance of these systems. CAL. GOV'T CODE §§ 31450-82 (West 1968 & Supp. 1975).

5. Section 31787 of the Government Code provides that the surviving spouse of an employee who dies as the result of an injury or disease arising out of and in the course of employment may elect to be paid an annual death allowance equal to one half of the member's final compensation until such spouse dies. *Id.* § 31787 (West 1968). The normal death allowance provided by section 31781.1 of the Government Code is limited to 60% of the monthly retirement allowance that the deceased member would have received if he had retired because of age or a non-service-connected disability. *Id.* § 31781.1 (West 1968).

6. 11 Cal. 3d at 34, 520 P.2d at 32, 112 Cal. Rptr. at 808.

7. 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971). In *Bixby*, the supreme court held that whenever a state agency's final decision substantially affects a fundamental vested right, the trial court reviewing that decision must reweigh the evidence and exercise an independent judgment on that evidence. *Id.* at 143, 481 P.2d at 251, 93 Cal. Rptr. at 243. For a discussion of *Bixby*, see text accompanying notes 37-42 *infra*.

8. Strumsky v. San Diego County Empl. Ret. Ass'n, 100 Cal. Rptr. 338, 343 (1972).

court found that an applicant for service-connected death benefits has a fundamental vested right to such benefits and that the trial court was therefore entitled to exercise its independent judgment on the evidence and to make its own findings of fact.[9]

The supreme court upheld the appellate court, stating that "there no longer exists any rational or legal justification for distinguishing with regard to judicial review between, on the one hand, local agencies and state agencies of local jurisdiction and, on the other, state agencies of legislative origin having statewide jurisdiction."[10] Therefore, in the review of the decisions of either kind of agency, if the administrative determination substantially affects a fundamental vested right and the petitioner alleges an abuse of discretion in that the findings are not supported by the evidence, the trial court must exercise its independent judgment and overrule any findings that are not supported by the weight of the evidence. If the agency's decision does not affect a fundamental vested right, however, the trial court is limited to determining whether the findings are supported by substantial evidence in light of the whole record.[11]

The court based the change in the rule for local agencies on a twenty-five year old amendment to article VI, section 1 of the California Constitution. Prior to 1950, this section read:

> The Judicial power of the State shall be vested in the Senate, sitting as a court of impeachment, in a Supreme Court, district courts of appeal, superior courts, such municipal courts as may be established in any city or city and county, and *such inferior courts* as the Legislature may establish in any incorporated city or town, township, county, or city and county.[12]

In 1950, this section was amended and the phrase "such inferior courts" was deleted. The court concluded that without this phrase there was no constitutional authority for local administrative agencies to make findings of fact entitled to judicial weight.[13]

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9. *Id.* at 344.

10. 11 Cal. 3d at 32, 520 P.2d at 31, 112 Cal. Rptr. at 807.

11. *Id.* The rule of *Strumsky* and *Bixby* is applied when the petitioner alleges that the agency abused its discretionary power to make findings of fact. Usually this allegation is made by applying for a writ of mandate pursuant to section 1094.5 of the California Code of Civil Procedure (often referred to as an administrative mandamus). For a discussion of section 1094.5, see note 36 & accompanying text *infra*.

12. (Emphasis added). Article VI, section 1 of the California Constitution now provides: "The judicial power of this State is vested in the Supreme Court, courts of appeal, superior courts, municipal courts, and justice courts. All except justice courts are courts of record."

13. 11 Cal. 3d at 38, 520 P.2d at 35, 112 Cal. Rptr. at 811. For a discussion of the effect of the 1950 amendment on the permissible powers of local agencies, see text accompanying notes 52-61 *infra*.

The *Strumsky* court also rendered an important holding regarding the definition of a fundamental vested right. The recognized rule had been that an employee who contributes to a retirement system has a vested right to some award, the actual amount of which is to be determined by the circumstances at the time of death or retirement. The right to a specific benefit does not vest until the applicant establishes that the contingency which makes him eligible for that benefit has occurred. The supreme court ruled in *Strumsky* that, in a dispute with the retirement board over the appropriate benefit, an employee or his beneficiary has a vested right to whatever benefit he claims.[14] The result is that whenever the agency concedes that the applicant is entitled to some benefit, but disputes the particular amount claimed, a reviewing court may make an independent determination of the appropriate award.

Historical Background

The significance of *Strumsky* is most apparent when it is viewed in the context of a series of California Supreme Court decisions concerning the scope of judicial review of administrative findings. In all of these cases, the court focused on two points: the extent of the powers granted to the agency by the California Constitution, and the nature of the right asserted by the party appealing the administrative decision.

In 1936, in *Standard Oil Co. v. State Board of Equalization*,[15] the supreme court made a unique departure from the widely accepted view that administrative agencies may make findings that carry judicial weight.[16] Plaintiff Standard Oil sought review of an order of the state board by writ of certiorari.[17] The supreme court held that the remedy sought was improper, because certiorari lies only for review of judicial decisions. The court stated that the legislature could not vest state administrative agencies with the power to make judicial decisions, because article VI, section 1 of the state constitution vests all of the judicial power of the state in specifically named courts, "except for local purposes."[18] The court distinguished its earlier decisions permitting

14. 11 Cal. 3d at 45-46, 520 P.2d at 40-41, 112 Cal. Rptr. at 816-17.

15. 6 Cal. 2d 557, 59 P.2d 119 (1936).

16. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.09, at 66 (1958) [hereinafter cited as DAVIS].

17. Section 1068 of the California Code of Civil Procedure provides for the writ of certiorari: "A writ of review may be granted by any court, except a municipal or justice court, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy." CAL. CODE CIV. PROC. § 1068 (West 1955). Prior to *Standard Oil*, this writ had been an accepted means of appealing final administrative decisions. DEERING, *supra* note 1, § 5.68.

18. 6 Cal. 2d at 560, 59 P.2d at 120.

the use of certiorari for review of the actions of local boards by suggesting that these agencies derived judicial power from the language in article VI, section 1 providing for the general category of local inferior courts.[19] The court also distinguished those agencies which are expressly authorized by other sections of the constitution to exercise judicial decisionmaking power.[20]

The following year, in *Whitten v. State Board of Optometry*,[21] the supreme court used the same reasoning to determine that a writ of prohibition could not lie to restrain a state board from revoking a license because this remedy is available only to prevent the wrongful exercise of *judicial* power.[22] The court commented that it would no longer use the characterization "quasi-judicial" as a justification for giving judicial weight to the findings of an agency. The court contrasted the administrative and the judicial functions:

> Agencies engaged in making administrative determinations, unlike courts, have the power and the facilities to investigate and initiate action and, more or less informally, find the facts which under the law justify a course of action. They cannot and do not declare the law but perform the sole duty of ascertainment.[23]

Whitten left unanswered the question of the proper procedure to obtain judicial review of an administrative decision.

This issue was resolved in 1939 in *Drummey v. State Board of Funeral Directors*.[24] The plaintiff appealed the administrative revocation of his professional license, and the supreme court held that in the absence of statutory provision for a trial de novo, the final decision of a state agency could be reviewed by writ of mandamus.[25] In this spe-

19. *Id.* at 561, 59 P.2d at 120. For the text of article VI, section 1 as it read in 1936, see text accompanying note 12 *supra*. Although this distinction was not made explicit, later decisions of the supreme court and lower courts followed that assumption. For example, in *Strumsky* the court referred to *Standard Oil* as "the landmark case [in which] we suggested one possible basis for the exercise of judicial powers by local agencies," and then cited several decisions which relied on this rationale as the basis for giving judicial weight to a local agency's findings. 11 Cal. 3d at 37, 520 P.2d at 35, 112 Cal. Rptr. at 811.

20. 6 Cal. 2d at 560, 563, 59 P.2d at 120, 121. The court gave as an example the Industrial Accident Commission, which is vested with judicial power by article XX, section 21 of the state constitution. For a discussion of the classification of other agencies as "constitutional," see DEERING, *supra* note 1, § 5.68.

21. 8 Cal. 2d 444, 65 P.2d 1296 (1937).

22. *Id.* at 445-46, 65 P.2d at 1296.

23. *Id.* at 446, 65 P.2d at 1297.

24. 13 Cal. 2d 75, 87 P.2d 848 (1939).

25. *Id.* California is exceptional in this use of the writ of mandamus. Traditionally the writ has been considered the proper remedy to correct the abuse of purely ministerial duties, but has not been thought applicable to the exercise of discretionary powers. 3 DAVIS, *supra* note 16, § 24.03, at 402-03, 413-14.

cial use of mandamus, the trial court must reweigh the evidence and make an independent determination of the facts.

The court gave two reasons for not limiting the trial court to an appellate "substantial evidence" function in reviewing the findings of fact. First, the court reaffirmed its holding in *Standard Oil* that the California Constitution does not permit the findings of a state agency to carry judicial weight.

> Moreover, for a purely administrative board to deprive a person of an existing valuable privilege [the right to practice one's profession] without the opportunity of having the finality of such action passed upon by a court of law, would probably violate the due process clause of the federal constitution.[26]

This due process argument followed the position of a small group of United States Supreme Court decisions which suggested that an administrative agency could not deprive an individual of a privilege or property without an independent judgment by a court on the findings of fact and the conclusions of law.[27]

In *McDonough v. Goodcell*,[28] decided in the same year, the plain-

26. 13 Cal. 2d at 84, 87 P.2d at 853 (1939).

27. *Id.* at 84-85, 87 P.2d at 853. This position, often referred to as the *Ben Avon* doctrine, is set forth in Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920), and St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936). The Supreme Court held that whenever a public utility or other entity subject to governmental rate regulation alleges that the rate-fixing agency has improperly evaluated the entity's assets and is thereby confiscating its property, the due process clause of the Fourteenth Amendment requires that the utility be given full judicial review with an independent determination of the facts by a court of law.

The *Drummey* court also cited Crowell v. Benson, 285 U.S. 22 (1932), *cited in* 13 Cal. 2d at 85, 87 P.2d at 853. In *Crowell*, the United States Supreme Court refused to find the Federal Longshoremen's and Harbor Workers' Compensation Act unconstitutional on the ground that it gave judicial power to an agency. The Court added the qualification, however, that the petitioner had a right to an independent judicial determination of the "jurisdictional" facts, *i.e.*, the establishment of those facts which would place the petitioner within the scope of the agency's regulatory powers according to the statute. 285 U.S. at 54-55. The California Supreme Court has never used the jurisdictional facts concept. The California court has also ignored the Supreme Court's holding in *Crowell* that Congress does have the power to create administrative agencies whose findings of fact, with the exception of the jurisdictional fact, *are binding* on the courts.

Commentators have argued that the *Ben Avon* doctrine is largely discredited by later decisions. *See* 4 DAVIS, *supra* note 16, § 29.09, at 167; Forkosch, *Judicial De Novo Review of Administrative Quasi-Judicial Fact Determinations*, 25 HASTINGS L.J. 963, 972-89 (1974). The contrary position is taken by Louis Jaffe. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 636-53 (1965) [hereinafter cited as JAFFE]. Professor Jaffe points out that the doctrine has never been expressly overruled and is still followed by some states. *Id.* at 651. In *Bixby v. Pierno*, the California Supreme Court noted the criticism but declined to reject the doctrine. 4 Cal. 3d at 138 n.4, 481 P.2d at 247-48 n.4, 93 Cal. Rptr. at 239-40 n.4.

28. 13 Cal. 2d 741, 91 P.2d 1035 (1939).

tiff appealed the denial, rather than the revocation, of a professional license. In clarifying the rule set forth in *Drummey*, the court held that when a state administrative board seeks to revoke a professional license, due process requires that the trial court render an independent judgment on the evidence. When a board merely denies an application for a license, however, the applicant is not being deprived of an existing property right; therefore, the trial court may not substitute its discretion for that of the board.[29]

The inconsistency in the court's reasoning becomes apparent when *Drummey* and *McDonough* are read together. In prior opinions the court had taken the position that state agencies could never make findings that carry judicial weight because the California Constitution vests such power exclusively in the courts. The due process argument in *Drummey* at first did not appear dispositive. But in *McDonough*, the court limited the right to an independent judgment on the evidence to only those cases which involve the possible loss of an existing valuable property right.[30] Thus a system emerged in which the available remedy and the scope of judicial review were determined by the classification of the agency and the type of interest asserted by the individual.[31]

Standard Oil and its progeny were not well received by the bar or the legislature. The limitation on the authority of the administrative agencies was vigorously opposed.[32] Two unsuccessful attempts

29. *Id.* at 751-53, 91 P.2d at 1041-42.

30. For further discussion of this inconsistency, see notes 111-13 & accompanying text *infra*.

31. The procedural role of *Drummey* was extended radically in Laisne v. California State Bd. of Optometry, 19 Cal. 2d 831, 123 P.2d 457 (1942). There, the court held that there must be a complete trial de novo whenever the reviewing court is required to make an independent judgment on the evidence. The court noted that the petitioner had been afforded full due process at the license revocation hearing, but nevertheless concluded that limiting the trial court to a review of the hearing record would have the effect of allowing the board to exercise judicial power. *Id.* at 834-35, 123 P.2d at 459-60.

The court retreated from this position somewhat in Dare v. Board of Medical Examiners, 21 Cal. 2d 790, 136 P.2d 304 (1943). In *Dare*, the court set forth the procedure for a limited trial de novo: the petitioner must allege specifically the improprieties of the board's actions in his application for a writ of mandamus; he must introduce the record of the hearing into evidence to sustain his allegations; he may object to evidence admitted at the hearing; he may introduce new evidence only if it was improperly excluded at the hearing or could not have been produced at the hearing with due diligence; he may recall witnesses for impeachment purposes only. *Id.* at 796-800, 136 P.2d at 307-09.

32. The commentators of this period were generally critical of the supreme court's strict application of the language of article VI, section 1 to the factfinding function of administrative agencies. They opposed the resulting complexity in determining the proper remedy and scope of review of administrative decisions. *See, e.g.*, Kleps, *Certio-*

were made to amend the California Constitution in order to give the legislature the power both to vest judicial authority in administrative agencies and to enact a corresponding procedure for judicial review of administrative decisions.[33] In 1943, the legislature empowered the Judicial Council of California to make a study of California administrative procedure and to recommend appropriate legislation.[34] This study resulted in two major enactments, the Administrative Procedure Act,[35] and section 1094.5 of the California Code of Civil Procedure. In proposing section 1094.5, the judicial council attempted to codify the case law of the *Standard Oil* progeny by establishing a special writ of administrative mandamus for review of the decisions of state and local agencies.[36]

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rarified Mandamus: Court Review of California Administrative Decisions 1939-1949, 2 STAN. L. REV. 285 (1950) [hereinafter cited as Kleps]; McGovney, *Court Review of Administrative Decisions in California: The Pending State Constitutional Amendment*, 30 CALIF. L. REV. 507 (1942); Peters, *Review of Administrative Board Rulings Limited to Writ of Mandate*, 14 CAL. ST. B.J. 313 (1939); Turrentine, *The Laisne Case—A Strange Chapter in Our State Jurisprudence*, 17 CAL. ST. B.J. 165 (1942); Turrentine, *Restore Certiorari to Review State-Wide Administrative Bodies in California*, 29 CALIF. L. REV. 275 (1941) [hereinafter cited as Turrentine]; Comment, *Administrative Adjudication in California and its Review by the Writ of Certiorari*, 25 CALIF. L. REV. 694 (1937).

33. Support for these amendments waned as the supreme court clarified the *Standard Oil* decision. Kleps, *supra* note 32, at 286-87 n.7. In addition, some critics of the court's position felt that the proposed constitutional amendments gave too much discretion to the legislature to distribute power between the agencies and the courts. *See, e.g.*, Bianchi, *The Case Against S.C.A. Number 8*, 17 CAL. ST. B.J. 172, 175-76 (1942).

34. Cal. Stat. 1943, ch. 991, §§ 1-2 at 2903-04. The results of this study appear in TENTH BIENNIAL REPORT, JUDICIAL COUNCIL OF CALIFORNIA (1944).

35. CAL. GOV'T CODE §§ 11370-528 (West 1966 & Supp. 1975). The Office of Administrative Procedure is part of the executive branch. Sections 11500-28 set forth the procedure to be used in adjudicatory proceedings of any agency governed by the act. Section 11501(b) lists the agencies governed by the act. The act guarantees the right to a written accusation in an action to revoke a license (section 11503); the right to a hearing (section 11506); the right to written notice of the hearing (section 11509); the right to issue subpoenas and to use other methods of discovery (sections 11507.6, 11507.7, 11510, 11511, 11514); the right to introduce evidence, call witnesses, and cross-examine witnesses (section 11513); and the right to receive written findings of fact and conclusions of law (section 11518). Every case shall be presided over by a hearing officer (section 11512); however, the agency may decide the case on the record and is not bound by the officer's recommendations (section 11517). *See id.*

Not all state agencies are governed by the Administrative Procedure Act. Many are governed by other statutes which likewise guarantee the right to a hearing and other aspects of due process. For example, the State Department of Public Health, which administers the California Pure Drug Act, is required to give notice and grant a hearing to any party accused of selling a drug in violation of that act. CAL. HEALTH & S. CODE §§ 26340-41 (West 1967). For other examples of agencies governed by separate statutes, see DEERING, *supra* note 1, § 2.4.

36. TENTH BIENNIAL REPORT, JUDICIAL COUNCIL OF CALIFORNIA 26-27 (1944). Section 1094.5 of the Code of Civil Procedure is the appropriate remedy to appeal the

The next major decision on the scope of judicial review of administrative findings, *Eixby v. Pierno*,[37] came in 1971. The trial court had refused to exercise its independent judgment on the evidence in reviewing a decision of the state commissioner of corporations. The supreme court took the opportunity to affirm the application of the *Standard Oil-Drummey* rule to actions brought pursuant to section 1094.5 of the Code of Civil Procedure.[38] Specifically, the court interpreted a phrase in subsection c of that statute, "in cases in which the court is authorized *by law* to exercise its independent judgment on the evidence,"[39] to mean that the trial court is required on a case by case approach to determine whether the agency's decision substantially affects a fundamental vested right, thereby entitling the petitioner to a limited trial de novo on the findings of fact.[40]

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final order of any agency governed by the Administrative Procedure Act. *See* CAL. GOV'T CODE § 11523 (West Supp. 1975). The legislature left intact the traditional writ of mandamus set forth in section 1085 of the Code of Civil Procedure. *See id.* (West 1955).

Section 1094.5 of the Code of Civil Procedure provides in substance that appeal by this special writ of mandate is limited to cases in which a hearing is required and the agency has discretionary power to determine facts. The case is heard in superior court without a jury. The scope of the inquiry is limited to three basic questions: whether the agency acted in excess of jurisdiction; whether there was a fair hearing; and whether there was any prejudicial abuse of discretion. The introduction of new evidence in the trial court is strictly limited. The court may set aside the agency's decision or order the agency to reconsider its decision in light of the court's judgment. The court may order a stay of the operation of the agency's order until it has rendered its judgment. *See* CAL. CODE CIVIL PROC. § 1094.5 (West Supp. 1975).

The rule of *Standard Oil* and *Drummey* is set forth in subsection c: "Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." *Id.* § 1094.5(c).

Section 1094.5 has become the accepted mode of review of a decision of any state, local, or constitutional agency unless an exclusive remedy is otherwise provided by the constitution or by statute. DEERING, *supra* note 1, §§ 1.4, 2.11. The section was supplemented by later decisions of the supreme court which held that the proper scope of appellate review of the trial court's findings was the usual substantial evidence test, whether the trial court had been required to make an independent judgment on the evidence (Moran v. Board of Medical Examiners, 32 Cal. 2d 301, 308-09, 196 P.2d 20, 25 (1948)) or had been limited to determining whether the agency's findings were supported by substantial evidence (Merrill v. Department of Motor Vehicles, 71 Cal. 2d 907, 915-16, 458 P.2d 33, 38, 80 Cal. Rptr. 89, 94 (1969)).

37. 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 235.

38. *Id.* at 134, 481 P.2d at 244, 93 Cal. Rptr. at 236.

39. CAL. CODE CIV. PROC. § 1094.5(c) (West 1955) (emphasis added). For the complete text of section 1094.5(c), see note 36 *supra*.

40. 4 Cal. 3d at 143-44, 481 P.2d at 251-52, 93 Cal. Rptr. at 243-44.

The importance of *Bixby* is that it redefined the right which is protected under section 1094.5. Earlier cases had focused on property rights, especially the right to practice one's profession under the authority of a state license. However, in *Bixby*, the court introduced the broader concept of the fundamental vested right:

> In determining whether the right is fundamental the courts do not alone weigh the economic aspect of it, but the effect of it in human terms and the importance of it to the individual in the life situation.[41]

The supreme court did not further refine this definition, allowing the lower courts the opportunity to apply the fundamental vested right concept to many new situations. Moreover, the *Bixby* court expressly reserved judgment on whether this rule should be extended to administrative mandamus proceedings brought against local agencies.[42]

Analysis of the Constitutional Sources of the Local Agency's Powers

It is against this historical background that the supreme court decided in *Strumsky* to abolish the distinction between local and state agencies in determining the scope of judicial review. Because *Standard Oil* and its progeny had established the rule that an administrative agency cannot exercise judicial power without express constitutional authorization, the *Strumsky* court was compelled to show that the California Constitution does not give local agencies the power to make decisions of judicial weight. Justice Sullivan, speaking for the majority, scrupulously analyzed those sections of the constitution which had been regarded as the source of judicial power for local agencies.

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41. *Id.* at 144, 481 P.2d at 252, 93 Cal. Rptr. at 244. The *Bixby* court speaks of the "fundamental vested right" as if this term had been used throughout the development of the *Standard Oil-Drummey* rule. *See id.* at 139, 143-44, 481 P.2d at 248, 251-52, 93 Cal. Rptr. at 240, 243-44. In fact, the earlier cases had involved a specific right or privilege, usually the right to continue the practice of one's profession, and never used the broader term. *See, e.g.*, Laisne v. California State Bd. of Optometry, 19 Cal. 2d at 840, 123 P.2d at 463 ("vested propety right"); Drummey v. State Bd. of Funeral Directors, 13 Cal. 2d at 84, 87 P.2d at 853 ("existing valuable privilege").

42. 4 Cal. 3d at 137 n.2, 481 P.2d at 246 n.2, 93 Cal. Rptr. at 238 n.2. In *Bekiaris v. Board of Education*, the petitioner appealed his dismissal from a probationary teaching position on the ground that the real reason for his dismissal was his exercise of the right to free speech in a manner that was politically offensive to school authorities. 6 Cal. 3d 575, 493 P.2d 480, 100 Cal. Rptr. 16 (1972). The supreme court held that, in view of his constitutional defense, the trial court was required to make an independent judgment on the evidence pertaining to the cause for dismissal. Again the court reserved judgment on the application of *Bixby* to local agencies under other circumstances. *Id.* at 591 n.10, 493 P.2d at 490 n.10, 100 Cal. Rptr. at 26 n.10.

The Doctrine of Separation of Powers

The majority opinion began with a discussion of the development of the *Standard Oil-Drummey* rule as an expression of the doctrine of separation of powers. This doctrine is set forth in article III, section 3 of the California Constitution: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."[43] The last phrase, "except as permitted by this Constitution," is the basis for the distinction between agencies created by legislative bodies (state and local) and constitutional agencies which derive judicial power directly from the constitution.[44] The status of the latter group is not changed by *Strumsky*.[45]

Justice Sullivan conceded that article III does not apply directly to local agencies.[46] This point was decided as early as 1868 in *People v. Provines*,[47] which held that the purpose of the separation of powers clause is to prevent the usurpation of power by the highest officers of the state. The *Provines* court concluded that the purpose of the state constitution is to establish and regulate state government only, leaving the legislature free to create and control local governments as authorized by article XI.[48] Justice Sullivan acknowledged that some California commentators, relying on *Provines*, have assumed that the state constitution would allow the legislature to grant judicial power to local agencies.[49] However, he found this reasoning unpersuasive.

> [T]he fact that agencies below the state level are not *prevented* from exercising judicial powers by the separation-of-prowers doctrine in no way implies in and of itself that they *may exercise* such powers. Because local bodies, like governmental entities on the state level, ultimately derive all their powers from the state Con-

43. It should be noted that while all states recognize this doctrine, it is neither a part of the federal constitution or of all state constitutions. 1 DAVIS, *supra* note 16, § 1.09, at 66. Thus the California rule on the limited power of administrative agencies to make findings of judicial weight has a state constitutional basis that forecloses an appeal to the United States Supreme Court.

44. 11 Cal. 3d at 35-36, 520 P.2d at 34, 112 Cal. Rptr. at 810. For a discussion of the constitutional agencies, see DEERING, *supra* note 1, §§ 1.3, 5.68. Deering points out that while certain agencies have been placed in this category by judicial decision, the status of many agencies is uncertain because there are constitutional provisions which *could* be construed as the source of their authority, but have not yet been so applied.

45. 11 Cal. 3d at 36, 520 P.2d at 34, 112 Cal. Rptr. at 810.

46. *Id.*

47. 34 Cal. 520, 534-37 (1868).

48. *Id.* at 532-33. For a discussion of article XI as the source of judicial power for local agencies, see notes 62-75 & accompanying text *infra*.

49. 11 Cal. 3d at 36 n.6, 520 P.2d at 34 n.6, 112 Cal. Rptr. at 810 n.6.

> stitution, it is in that document that we must seek the basis for any exercise of judicial power by such bodies.[50]

Justice Burke, in a dissenting opinion, took sharp issue with this position. Relying extensively on *Provines*, he argued that "the Constitution does not contain any limitation upon the powers of *local* government, other than as are contained in the Constitution itself or in statutes or charters adopted pursuant thereto."[51]

The Inferior Courts Theory

Justice Sullivan next examined article VI, section 1 of the constitution,[52] which had been the basis for the theory that local agencies could exercise judicial power because they were "inferior courts." This theory first appeared as dictum in *Standard Oil*,[53] was reiterated in *Drummey*,[54] and was adopted by later decisions.[55] Because the 1950 amendment to this section deleted the category of inferior courts, Justice Sullivan found that this rationale is no longer supported by the constitution.[56] Again he took a literal approach, requiring express language in the constitution to justify the exercise of judicial power by local agencies.[57]

50. *Id.* at 36, 520 P.2d at 34, 112 Cal. Rptr. at 810 (footnotes omitted).

51. *Id.* at 49, 520 P.2d at 43, 42 Cal. Rptr. at 819 (Burke, J., dissenting).

52. For the pre-1950 language of this section of the constitution, see text accompanying note 12 *supra*.

53. Standard Oil Co. v. State Bd. of Equalization, 6 Cal. 2d 557, 560, 59 P.2d 119, 120 (1936).

54. Drummey v. State Bd. of Funeral Directors, 13 Cal. 2d 75, 81, 87 P.2d 848, 852 (1939).

55. *See* 11 Cal. 3d at 37-38, 520 P.2d at 35, 112 Cal. Rptr. at 811.

56. *Id.* at 38, 520 P.2d at 35, 112 Cal. Rptr. at 811.

57. There is considerable support for the argument that local agencies were never seriously considered to be courts, before or after *Standard Oil*, and that the original application of the term to agencies was erroneous. For example, in Chinn v. Superior Court, 156 Cal. 478, 481-82, 105 P. 580, 581 (1909), the supreme court said: "But because a board of supervisors may exercise judicial functions, it is by no means an inferior court within the meaning of that term as employed in the constitution relative to the appellate jurisdiction of the superior courts. The term 'inferior courts' has a well-recognized meaning. They are courts established for the administration of justice charged with the exercise of judicial power as a substantive duty, but with limited jurisdiction in that regard, and that jurisdiction usually confined to limits of the city or town for which they are mainly created." *See* People *ex rel.* Chapman v. Sacramento Drainage Dist., 155 Cal. 373, 387, 103 P. 207, 214 (1909).

Several commentators have noted the practical contradictions of declaring that a local agency is an inferior court. *See, e.g.*, Elliot, *Certiorari and the Local Board*, 29 CALIF. L. REV. 586, 586-87 (1941); Kleps, *supra* note 32, at 291 n.23; McGovney, *The California Chaos in Court Review of the Decisions of State Administrative Agencies*, 15 S. CAL. L. REV. 391, 409 (1942); Turrentine, *supra* note 32, at 277 n.11. See Justice Traynor's dissenting opinion in *Dare v. Board of Medical Examiners*, in which he points out that "[i]f indeed [local agencies] are courts it is remarkable that the Legislature

The conclusion that the 1950 amendment changed the function of local agencies conflicts with the legislative history of that amendment. The Judicial Council of California conducted a study of the local court system and made recommendations that led to the amendment. No reference was made to administrative agencies.[58] In a later report on the resulting reoganization of the local courts, the council specified that the purpose of the amendment was to consolidate the local court system into two courts below the superior court (justice and municipal), thereby abolishing eight separate kinds of inferior courts that had existed previously. Again, no mention was made of local administrative agencies.[59] Similarly, the election pamphlet of 1950, in which arguments for and against the amendment were presented to the voters, made no reference to local agencies.[60] Neither the legislature nor the voters intended by this amendment to change the status of local administrative agencies. Nevertheless, to the extent that courts had relied on the former text of article VI, section 1 to support the "inferior courts" theory, Justice Sullivan's conclusion as to the effect of the deletion of that language is consistent with his conclusion that express authority is required.[61]

The Home Rule Theory

Many post-*Standard Oil* decisions had relied on the home rule theory to justify the distinction between the permissible powers of state and local agencies. According to this theory, the legislature, having been granted the authority to establish local governments by article XI of the California Constitution, could thereby vest judicial power in local agencies or allow local governments to do so.[62] The theory was first

may vest in them a variety of other powers not judicial." 21 Cal. 2d 790, 813, 136 P.2d 304, 316 (1943) (dissenting opinion).

58. TWELFTH BIENNIAL REPORT, JUDICIAL COUNCIL OF CALIFORNIA 13-20 (1948).

59. FOURTEENTH BIENNIAL REPORT, JUDICIAL COUNCIL OF CALIFORNIA 14 (1953).

60. PROPOSED AMENDMENTS TO CONSTITUTION, PROPOSITIONS AND PROPOSED LAWS, GENERAL ELECTION, TUESDAY, NOV. 7, 1950, at 4-5.

61. The supreme court in *Strumsky* could have chosen to overrule this designation directly, correcting the error made in *Standard Oil*, by holding that local agencies are not courts and therefore cannot exercise judicial power. This approach would have achieved the same result, extending the rule in *Bixby* to local agencies, without resorting to an unrealistic interpretation of the 1950 amendment.

Justice Roth wrote a brief dissenting opinion in which he scathingly criticized this belated interpretation of the amendment: "The current decision demonstrates that amendments to our fundamental law even though originally ratified and accepted by the courts, may be reconstrued in such a manner as to effectually emasculate them.

"The real question is not one of separation of powers but whether the People have, by the Constitution they originally wrote, effectively foreclosed themselves from making any change in their constitutional structure and have abdicated all power to the judiciary." 11 Cal. 3d at 58, 520 P.2d at 50, 112 Cal. Rptr. at 826.

62. This analysis of the legislature's power under article XI was first made in

applied to the question of the scope of review of a local agency's decision in *Dierssen v. Civil Service Commission*,[63] decided by a court of appeal prior to the 1950 amendment. It was expanded in *Savage v. Sox*,[64] a 1953 court of appeal decision. In both cases, the appellate courts upheld the trial court's use of the substantial evidence test on the ground that a local agency's findings of fact have judicial weight.

Justice Sullivan concluded that this rationale was incorrect. He noted that the appellate courts in *Dierssen* and *Sox* had based the home rule theory on the following sentence from the supreme court's decision in *Drummey v. State Board of Funeral Directors*:

> The theory . . . of *Standard Oil* . . . is that, if the legislature attempted to confer judicial or *quasi*-judicial power on state-wide administrative boards, the statutes would be unconstitutional as in violation of section 1 of article VI of the state Constitution, which vests the entire judicial power of the state in the courts, *except as to local boards*, and the railroad and industrial accident commissions, which are governed by special constitutional provisions.[65]

The *Dierssen* court had interpreted this to mean that there was an additional constitutional source of judicial power for local agencies, and found it in article XI.[66] Justice Sullivan meticulously explained that this conclusion was based on a misreading of the *Drummey* language in that the phrase "governed by special constitutional provisions" did not refer back to the phrase "local boards."[67] The *Drummey* court, therefore, was not suggesting that there was another constitutional provision, in addition to article VI, section 1 (the "inferior courts" clause), which vested judicial power in local agencies.

The *Savage* court had taken the *Dierssen* reasoning one step further by concluding that the 1950 amendment to Article VI, section 1 did not affect the power of local agencies:

> The elimination of the power of the Legislature to provide other inferior *courts* . . . still left the constitutional provisions which the charter of a city and county could lawfully confer quasi-judicial powers on boards or commissions dealing strictly with municipal affairs.[68]

Justice Sullivan rejected this argument on the ground that article VI, section 1 dispenses all the judicial power of the state. As a result, although the legislature may create local governments pursuant to article

People v. Provines, in which the supreme court held that the doctrine of separation of powers does not extend to local agencies. 34 Cal. 520 (1868). See notes 47-51 & accompanying text *supra*.

63. 43 Cal. App. 2d 53, 59-61, 110 P.2d 513, 517-18 (1941).
64. 118 Cal. App. 2d 479, 485-88, 258 P.2d 80, 84-86 (1953).
65. 13 Cal. 2d at 81, 87 P.2d at 852.
66. 43 Cal. App. 2d 53, 60, 110 P.2d 513, 517 (1941).
67. 11 Cal. 3d at 39-40, 520 P.2d at 36-37, 112 Cal. Rptr. at 812-13.
68. 118 Cal. App. 2d 479, 488, 258 P.2d 80, 86 (1953).

XI either by its own enactments or by approving charters, it cannot grant judicial power to any local entity.[69] This is a logical correlative to Justice Sullivan's first conclusion, that article III, the separation of powers clause, does not permit the legislature to create local agencies with judicial power absent other express constitutional authorization.

Article XI authorizes the legislature to establish procedures for the formation of local governments and to provide for their powers.[70] At the time *Strumsky* was decided, it also authorized the legislature to approve charters.[71] The article further describes what powers a city or county may assert in its charter.[72] Finally, article XI allows local governments to make and enforce any regulations and ordinances which do not conflict with the general laws.[73] As the majority opinion points out, the article does not explicitly authorize local agencies to exercise judicial power, nor does it confer upon the legislature the right to vest such power in the agencies.

Justice Burke, in his dissenting opinion, acknowledged this point but nevertheless found sufficient authority in article XI for the legislature to vest any combination of powers in local agencies.[74]

> As I understand it, the majority's ruling is based primarily upon the premise that, in the absence of an *express* constitutional grant of power, local agencies may not exercise quasi-judicial functions. Yet as the *Provines* and *Dierrsen* cases so clearly explain, such a grant of power is implicit in the home rule provisions of article XI and in the powers granted the Legislature to provide for local agencies of government contained in that article, and the limitation of article III to state government.[75]

Essentially the majority opinion and Justice Burke's dissenting opinion conflict in their interpretations of article XI. While Justice Sullivan takes a strict constructionist stance, Justice Burke is willing to give a more expansive reading to the article. Either position is intellectually and logically acceptable. The real distinction lies in the underlying policy concerns of the different members of the court.

69. 11 Cal. 3d at 40-43, 520 P.2d at 37-39, 112 Cal. Rptr. at 813-15. In contrast, in a 1964 decision the supreme court expressly approved the *Savage* holding and commented that it was not the "intent" of the 1950 amendment to change the scope of judicial review of local agencies' decisions. Berggren v. Moore, 61 Cal. 2d 347, 349, 392 P.2d 522, 524, 38 Cal. Rptr. 722, 724 (1964).

70. CAL. CONST. art. XI, §§ 1-2 (1970).

71. *Id.* § 3. This section was amended by the November 5, 1974, election. Today a city is required to file its charter with the secretary of state. The charter will then become part of the law of the state; actual legislative approval is no longer required. *Id.* (1974).

72. *Id.* §§ 4-5 (1970).

73. *Id.* § 7.

74. 11 Cal. 3d at 48-51, 520 P.2d at 42-45, 112 Cal. Rptr. at 818-21 (Burke, J., dissenting).

75. *Id.* at 51 n.5, 520 P.2d at 44 n.5, 112 Cal. Rptr. at 820 n.5.

The majority of the California Supreme Court has consistently been concerned with controlling the broad powers of administrative agencies and with protecting the individual in the administrative tribunal. This attitude, although not expressed in *Strumsky*, is clearly presented in Justice Tobriner's majority opinion in *Bixby v. Pierno*:

> Although we recognize that the California rule yields no fixed formula and guarantees no predictably exact ruling in each case, it performs a precious function in the protection of the rights of the individual. Too often the independent thinker or crusader is subjected to the retaliation of the professional or trade group . . . . The unpopular protestant may well provoke an aroused zeal of scrutiny by the licensing body that finds trivial grounds for license revocation . . . . Before his license is revoked, such an individual, who walks in the shadow of the governmental monoliths, deserves the protection of a full and independent judicial hearing.[76]

This extravagant language exemplifies the philosophy of a majority of the court as to the role of the judiciary in a dispute between the agency and the individual. Justice Burke, however, views the administrative agency as a valuable governmental body that can lighten the work load of the judicial branch and provide an expertise that the courts often lack. He is unwilling to hamper the agency with a rule of strict judicial scrutiny that may result in numerous appeals.[77]

The Fundamental Vested Right

The first portion of the *Strumsky* decision established a uniform rule for determining the proper scope of judicial review of administrative decisions, applicable to all agencies (statewide or local)[78] except

76. 4 Cal. 3d at 146-47, 481 P.2d at 254, 93 Cal. Rptr. at 246 (citations omitted). This policy of close judicial scrutiny of administrative agencies is clearly extended to local agencies by *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, which was decided shortly after *Strumsky*. 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974). Justice Tobriner, speaking for the majority, made these observations on the role of the courts in reviewing the decisions of local planning commissions: "Abdication by the judiciary of its responsibility to examine variance boards decisionmaking when called upon to do so could very well lead to [unjustified variance awards]. Significantly, many zoning boards employ adjudicatory procedures that may be characterized as casual. The availability of careful judicial review may help conduce these boards to insure that all parties have an opportunity fully to present their evidence and arguments. Further . . . the membership of some zoning boards may be inadequately insulated from the interests whose advocates most frequently seek variances [citations omitted]. Vigorous judicial review thus can serve to mitigate the effects of insufficiently independent decision-making." *Id.* at 518, 522 P.2d at 19, 113 Cal. Rptr. at 843 (citations omitted). For a discussion of *Topanga*, see note 181 *infra*.

77. 11 Cal. 3d at 47-48, 55, 520 P.2d at 42, 47, 112 Cal. Rptr. at 818, 823 (Burke, J., dissenting).

78. *Strumsky* extended the rule to both local agencies and state agencies with local jurisdiction. *Id.* at 32, 520 P.2d at 31, 112 Cal. Rptr. at 807. The classification of the latter group as "local" is yet another example of the confusing approach taken by

the small group of constitutional agencies.[79] This is a commendable result in that, for the most part, the classification of an agency is now no longer a factor in determining the scope of review. The new rule, first set forth as to state agencies in *Bixby* and extended to local agencies by *Strumsky*, may be stated as follows. If the final decision of an administrative agency substantially affects a fundamental vested right, the reviewing court must exercise its independent judgment on the evidence and find an abuse of discretion if the agency's findings are not supported by *the weight of the evidence*. If, however, the administrative decision does *not* substantially affect a fundamental vested right, the trial court is limited to determining whether there is *substantial* evidence to support the findings in light of the whole record.[80] Thus, the determinative factor in ascertaining the scope of judicial review is the possibility that a party may be deprived of a fundamental vested right.

As was discussed earlier in this note,[81] the concept of the fundamental vested right was first used in this context in *Bixby v. Pierno*. The *Bixby* court loosely defined a fundamental right as one that effects the individual's life situation.[82] The court stressed that it would show "slighter senstivity to the preservation of purely economic privileges . . . ."[83] In determining whether the independent judgment test should be used, the court considered "the degree to which that right is 'vested' that is, already possessed by the individual."[84]

Mrs. Strumsky claimed that she was entitled to a service-connected death allowance, an amount substantially larger than the normal death allowance which the retirement board awarded her.[85] The second issue before the court was whether the right to that particular benefit was fundamental and vested. In deciding this question, Justice Sullivan set forth a complicated analysis of the relationship between the

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the California courts in reviewing administrative decisions. Certain agencies, created by the state legislature and having offices throughout the state, have been treated by the courts as if each local district were a separate local agency. None of the decisions explains why the local agency rule should be applied to agencies that are unquestionably part of the state level government. *See, e.g.*, Griggs v. Board of Trustees, 61 Cal. 2d 93, 96, 389 P.2d 722, 725, 37 Cal. Rptr. 194, 197 (1964) (school board); Atchison, Topeka & Santa Fe Ry. v. Kings County Water Dist., 47 Cal. 2d 140, 143, 302 P.2d 1, 2 (1956) (water districts); Irvine v. Citrus Pest Dist., 62 Cal. App. 2d 378, 384-85, 144 P.2d 857, 861 (1944) (pest control districts). *See also* DEERING, *supra* note 1, § 5.66.

79. See note 20 & accompanying text *supra*.
80. 11 Cal. 3d at 32, 520 P.2d at 31, 112 Cal. Rptr. at 807.
81. See text accompanying notes 37-42 *supra*.
82. See text accompanying note 41 *supra*.
83. 4 Cal. 3d at 145, 481 P.2d at 253, 93 Cal. Rptr. at 245.
84. *Id.* at 146, 481 P.2d at 253, 93 Cal. Rptr. at 245 (citations omitted).
85. 11 Cal. 3d at 33, 520 P.2d at 32, 112 Cal. Rptr. at 808.

fundamental nature of a right and vested nature of a right. His discussion suggests an expansion of the *Bixby* definition, at least as applied to retirement benefits, however, the extent of actual change in the definition of a fundamental vested right is unclear.

There is considerable decisional law in California on the public employee's right to receive retirement benefits. When the employee is required to contribute to a pension plan financed by the government-employer, the benefits he eventually receives are consideration for services rendered or for injuries sustained during employment. The courts have held, therefore, that the right to receive these benefits vests when the employee accepts his position.[86] However, the right to a specific amount vests only when the contingency arises which entitles the employee to receive his benefits.[87] The right to receive benefits can be terminated by a condition subsequent, such as resignation before attaining retirement age.[88] Moreover, the pre-*Strumsky* rule was that, when a pension provides certain survivor's benefits for the employee's spouse, the spouse's right did not vest until the occurrence of that event which would entitle him or her to begin receiving benefits.[89]

The *Strumsky* court relied on this previous case law for the basic proposition that the public employee has a vested right to retirement benefits.[90] The court considered for the first time, however, the question of whether the right is fundamental and vested for the purpose of determining the scope of judicial review. The majority opinion appears to hold that the applicant for retirement benefits has a fundamental vested right to those benefits for which he claims eligibility.

First Justice Sullivan pointed out "the practical consideration . . . that the service-connected allowance provides the possibility of self-support, whereas the residual allowance does not . . . ."[91] Applying the *Bixby* rationale (the importance of the right to the individual in the life situation), he found this right to be fundamental.[92] However, the conclusion that Mrs. Strumsky had a fundamental right to the larger allowance because it would allow her to be self-supporting meets only the first prong of the established fundamental vested rights test. Justice Sullivan specifically put this contention aside and posed instead the

86. Dryden v. Board of Pension Comm'rs, 6 Cal. 2d 575, 578-79, 59 P.2d 104, 106 (1936); *see* Pearson v. County of Los Angeles, 49 Cal. 2d 523, 531-32, 319 P.2d 624, 629 (1957).

87. *See* Casserly v. City of Oakland, 6 Cal. 2d 64, 66, 56 P.2d 237, 238 (1936).

88. Kern v. City of Long Beach, 29 Cal. 2d 848, 853, 179 P.2d 799, 802 (1947).

89. Packer v. Board of Ret., 35 Cal. 2d 212, 215-16, 217 P.2d 660, 662-63 (1950); Sweesy v. Los Angeles County Peace Officers Ret. Bd., 17 Cal. 2d 356, 362, 110 P.2d 37, 40 (1941).

90. 11 Cal. 3d at 45, 520 P.2d at 40, 112 Cal. Rptr. at 816.

91. *Id.*

92. *Id.*

general question of whether the right to a benefit of a specific amount is fundamental and vested. Noting that the service-connected allowance[93] and the normal death allowance[94] are two distinct benefits under the statutory scheme, he said:

> It is true that the wife had no vested right in either of these pensions until the happening of the contingency upon which the benefits were payable, but upon the happening of that contingency (*i.e.*, the death of her husband) she acquired a fundamental vested right in one pension or the other—according to whether or not that death was service-connected. It is the latter question which requires a judicial determination under the rule we announce today . . . .[95]

Thus, his second conclusion was that Mrs. Strumsky had a fundamental and vested right to one benefit or the other.

The above quoted passage may be interpreted in two ways. If Justice Sullivan is discussing only the requirement that the right be vested, his reasoning provides a practical solution to this particular type of fact situation. When there is an undisputed right to some benefit because the primary contingency has occurred (here, the death of a member of the retirement system) and the factual issue is whether the secondary contingency which would entitle the applicant to a particular allowance has occurred, then, for purposes of judicial review, the applicant has a vested right.

Justice Burke disputed this conclusion in his dissenting opinion. He pointed out that, by the previously accepted rule, the right to the larger allowance could not vest until the service-connected death had been established. Thus, resolution of this second, disputed issue was a necessary prerequisite to a determination of whether Mrs. Strumsky in fact *had* a vested right.[96] He suggested that the effect of the majority's position would be to change the long established rule that the new applicant for welfare benefits does not have a vested right to the benefits, but only the right to apply.[97] His example is not truly analogous, however, because Justice Sullivan limited his discussion to the peculiar situation of retirement systems, whereby the applicant may have a vested right to some benefit even *before* he applies. Justice Sullivan did not suggest that an applicant for a benefit or a license has a vested right before he has established eligibility.[98]

93. CAL. GOV'T CODE § 31787 (West 1968).

94. *Id.* § 31781.1.

95. 11 Cal. 3d at 45-46, 520 P.2d at 41, 112 Cal. Rptr. at 817 (citations omitted).

96. *Id.* at 55, 520 P.2d at 47-48, 112 Cal. Rptr. at 823-24 (Burke, J., dissenting).

97. *Id.* See note 114 *infra.*

98. This language in *Strumsky* does not mean that an applicant for retirement benefits always has a vested right. For example, section 31720 of the California Government Code provides for early retirement in the event of a permanent disability arising out of the course of employment. If a public employee resigns before retirement age (a condition subsequent which normally terminates the right to receive retirement bene-

Unfortunately, it is not clear that Justice Sullivan was discussing only the vested nature of Mrs. Strumsky's right. He stated that, even disregarding the effect on self-support of the substantial difference in the amounts, the right to one benefit or the other was both *fundamental and vested.* He may have meant that the applicant for retirement benefits always has a fundamental right because of the economic impact of leaving employment. On the other hand, his first conclusion implied that the determination of whether the right is fundamental depended on the degree of difference between the two benefits and the personal financial situation of the applicant.[99] Such a test might be applicable to situations not involving retirement benefits, such as a dispute over the adjustment of the amount of welfare benefits to which a current recipient is entitled. Justice Sullivan's failure to distinguish his reasons for finding the right to be fundamental from his reasons for finding the right to be vested will probably result in confusion in the trial courts that must apply the *Strumsky* rule.

Close examination of the *Strumsky* opinion thus reveals that the decision could have a dual impact. By extending the rule in *Bixby* to local agencies, the supreme court has simplified the task of determining the proper scope of judicial review of an administrative decision. However, the court's ambiguous treatment of the narrow factual issue in the case could create new problems in determining whether rights are fundamental and vested.

The Relationship Between the Agency and the Courts: The California Approach

An examination of the California Supreme Court's decisions from *Standard Oil* to *Strumsky* reveals the court's deep distrust of the administrative agency.[100] This distrust is manifested by the court's rigid ap-

fits) and applies for benefits on the ground that he has a permanent service-connected disability, he does not have a vested right to this allowance, only the right to apply. But if the employee succeeds in establishing the disability, he has a vested right to continue receiving benefits; and if the board later determines that he is no longer incapacitated and cancels the award (as permitted by sections 31729 and 31730 of the Government Code), the employee is protected by the *Strumsky* rule.

99. Such a test would require the trial court to hear additional evidence on the applicant's current income in order to determine the proper scope of review. This requirement of stringent judicial inquiry is particularly desirable in the case of the retired public employee and his spouse at a time when the economic plight of the elderly citizen is patently deteriorating. In view of the large number of older persons who are dependent on a fixed income of meager retirement benefits, it is regrettable that the court in *Strumsky* was not more specific about the right to benefits in an amount sufficient for self support.

100. One commentator on the *Standard Oil* decision called the California Supreme Court of 1936 "a court bent on nullifying and/or preventing the advent of a little New Deal in California with its usual incidence of bureaucratic control and regulation." He

plication of the doctrine of separation of powers: an administrative agency cannot make a conclusive finding of fact because that is a function granted solely to the judicial branch by the California Constitution. The court refuses to compromise by allowing the agency to exercise a *quasi*-judicial function; indeed, in *Strumsky*, the court specifically declined to use this term to describe the factfinding function of agencies, characterizing it as a mere gloss to avoid recognition of a violation of the doctrine of separation of powers.[101]

As Professors Davis and Jaffe point out, the administrative agency is a necessity in a complex society, and a literal application of the doctrine of separation of powers would make its very existence unconstitutional because by definition the agency exercises executive, legislative, and judicial functions.[102] Professor Jaffe comments on the need for a flexible application of the doctrine:

> The three great classes, with the aid of specific constitutional allocations of authority, establish three polar functions; in the polar areas there is an intelligible doctrine which the courts have seen fit to enforce. But beyond these areas logic tolerates and convenience dictates concurrent jurisdiction and combination of functions.[103]

Most American jurisdictions compromise by giving some judicial weight to the agency's decisions, whether such determinations are denominated *judicial* or *quasi-judicial*. Therefore, the generally accepted rule is that when a court reviews an agency's findings of fact, it applies the the substantial evidence test: the court must sustain those findings if there is substantial evidence to support them, or, as it is sometimes phrased, if the findings are reasonable in light of the whole record.[104]

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further noted that "[t]he parallel between the hostility on the part of the California Supreme Court to administrative agencies and the hostility of the United States Supreme Court to similar agencies on the federal level during the same period is obvious." Netterville, *Judicial Review: The "Independent Judgment" Anomaly*, 44 CALIF. L. REV. 262, 264 & n.8 (1956) [hereinafter cited as Netterville]. However, while it is generally agreed that the United States Supreme Court has retrenched from its position in the *Ben Avon* and *St. Joseph Stock Yards* decisions, the California court has not. See note 27 & accompanying text *supra*. In *Bixby v. Pierno*, the court acknowledged that the *Ben Avon* doctrine is no longer part of federal administrative law, but declined to adopt this position. 4 Cal. 3d at 138 n.4, 481 P.2d at 247 n.4, 93 Cal. Rptr. at 239 n.4.

101. 11 Cal. 3d at 42 n.14, 520 P.2d at 38 n.14, 112 Cal. Rptr. at 814 n.14.

102. 1 DAVIS, *supra* note 16, § 1.09, at 64-68; JAFFE, *supra* note 27, at 28, 32-33 (1965).

103. JAFFE, *supra* note 27, at 28.

104. 4 DAVIS, *supra* note 16, § 29.01, at 166-67. The complement to this approach is to require the agency to provide hearings with certain guarantees of due process, such as the right to a record of the evidence and the right to cross-examine witnesses. The right to a fair hearing coupled with the check of judicial review is deemed sufficient protection against possible abuse of power by the agency. *Id.* § 29.09, at 166-67. While the California Supreme Court has consistently recognized the right to due process by

There has always been support for this position in California, both from the commentators[105] and from members of the supreme court. Notably, Justices Traynor and Gibson, who were not on the court when *Standard Oil* and *Drummey* were decided, strongly criticized the refusal to give judicial weight to administrative decisions.[106] More recently, Justice Burke urged the adoption of the substantial evidence rule for review of all administrative decisions in his concurring opinion in *Bixby v. Pierno*.[107]

Carried to its logical extension, the position that administrative agencies in California cannot make judicially binding determinations of fact should have led to the conclusion that all such decisions were subject to a de novo proceeding in a court of law. To avoid the obvious result—namely that the courts would have to assume a large portion of the agencies' functions—the supreme court retreated from an absolutist position: there is a right to an independent judgment on the evidence only when the petitioner is being deprived of a fundamental vested right.

As discussed above, this exception was originally based on two United States Supreme Court cases which were concerned with the narrow issue of ratefixing by federal agencies and which have been rendered moot by later decisions.[108] The majority of the California Supreme Court has never been troubled by the dubious status of these cases as authortiy.[109] After the original enunciation of the rule in *Drummey*, the court never again explicitly relied on the Fourteenth Amendment to justify its position. Indeed, in *Bixby*, the court did not even mention the Fourteenth Amendment in defining a fundamental vested right.[110]

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a hearing, *e.g.*, McCullough v. Terzian, 2 Cal. 3d 647, 470 P.2d 4, 87 Cal. Rptr. 195 (1970) (right to a hearing before the termination of welfare benefits), it has never considered a fair hearing a sufficient safeguard to obviate the need for an independent review of the evidence in some circumstances. For example, in *Laisne v. California State Board of Optometry*, the court made special note of the full due process afforded the petitioner in the hearing, yet held that he was entitled to a trial de novo on the revocation of his license. 19 Cal. 2d 831, 835, 123 P.2d 457, 460 (1942). See note 31 *supra*.

105. *See, e.g.*, McGovney, *The California Chaos in Court Review of the Decisions of State Administrative Agencies*, 15 S. CAL. L. REV. 391 (1942); Molinari, *California Administrative Process: A Synthesis Updated*, 10 SANTA CLARA LAW. 274 (1970); Netterville, *supra* note 100; Turrentine, *supra* note 32.

106. Dare v. Board of Medical Examiners, 21 Cal. 2d 790, 803-16, 136 P.2d 304, 311-18 (1943) (Traynor, J., concurring and dissenting); Laisne v. California State Bd. of Optometry, 19 Cal. 2d 831, 848-69, 123 P.2d 457, 467-78 (1942) (Gibson, C.J., dissenting).

107. 4 Cal. 3d at 159, 481 P.2d at 263, 93 Cal. Rptr. at 255 (Burke, J., concurring).

108. See note 27 & accompanying text *supra*.

109. See note 100 *supra*.

110. *See* 4 Cal. 3d at 144-47, 481 P.2d at 252-54, 93 Cal. Rptr. at 244-46. Cer-

The California court bases the right to an independent judgment review on the doctrine of separation of powers as set forth in the state constitution. Apparently, the only time an agency is acting judicially and therefore in violation of the doctrine is when it makes a decision which affects a fundamental vested right. In all other cases, the agency is not subject to the limitations imposed by the doctrine. The closest the court has come to explicitly enunciating this dual-faceted principle is *Laisne v. State Board of Optometry*, in which the court said: "It is the facts found plus the order based thereon depriving a person of a property right which is the full exercise of judicial power."[111] Thus the court acknowledges the general power of administrative agencies to find facts and apply them to the law which they are authorized to enforce. Only under certain circumstances is the exercise of this function considered to be "judicial," and therefore violative of the state constitution.

This distinction is difficult to accept. For example, in *Bixby*, the court said that when an agency denies an application for a license, it will defer to the agency's expertise and apply a substantial evidence standard of review; but when the agency revokes a license, it is engaging in a judicial act which would deprive the individual of his fundamental vested right to continue his trade, and the reviewing court must therefore exercise its independent judgment on the evidence.[112] The court has never fully or adequately justified its position that an administrative decision which affects a nonfundamental or nonvested right is for that reason any less judicial in nature.[113]

Thus, both in its analysis of the agency's authority within the doctrine of separation of powers and in its development of the subsidiary rule of the fundamental vested right, the court has left gaps and inconsistencies. Nonetheless, although this policy has been criticized for nearly forty years, the California Supreme Court has upheld the right of the judiciary to intervene in those cases in which a routine adminis-

tainly the California Supreme Court has been influenced by United States Supreme Court decisions holding certain rights and liberties to be fundamental. *See, e.g., id.* at 145 n.12, 481 P.2d at 252 n.12, 93 Cal. Rptr. at 244 n.12. Nevertheless, the *Bixby* definition of a fundamental vested right and its relationship to the right to an independent judicial review are not founded on the Fourteenth Amendment.

111. 19 Cal. 2d 831, 844, 123 P.2d 457, 465 (1942).

112. 4 Cal. 3d at 144, 481 P.2d at 252, 93 Cal. Rptr. at 244. Justice Mosk, in his concurring opinion, pointed out that in either situation, a qualified individual's right to a license may be denied because of the prejudicial attitudes of administrative officers. *Id.* at 161, 481 P.2d at 264, 93 Cal. Rptr. at 256 (Mosk, J., concurring).

113. Justice Roth, dissenting in *Strumsky*, noted this discrepancy: "If the exercise by a 'local agency' of binding fact-finding power is the exercise of a judicial function in respect of fundamental and vested rights—it is also the exercise of a judicial function in respect of such rights, if any, which may be tolerantly regarded as non-fundamental and non-vested." 11 Cal. 3d at 58, 520 P.2d at 50, 112 Cal. Rptr. at 826.

trative decision may have a crucial impact on the individual's life.

After Bixby and Strumsky: The Practical Effects

Bixby and *Strumsky* have also been criticized for the practical effects they will have on the functioning of both administrative agencies and superior courts. The criticisms expressed by Justice Burke's dissenting opinions are typical of the objections made to the *Bixby-Strumsky* rule: that the definition of a fundamental vested right is too vague and too broad to be useful;[114] that the task of determining whether a right is fundamental and of reweighing the evidence will burden the already overworked superior courts; that the rule undermines the authority of the agency, which often has more expertise than the reviewing court in the subject matter of the dispute; and that the extension of the rule to the numerous local agencies will encourage a deluge of appeals.[115]

An examination of the post-*Bixby* and the post-*Strumsky* appellate decisions gives some insight into how the superior courts are applying the rule in administrative appeals. These decisions suggest that the rule is viable, although some procedural and substantive problems still remain in determining the appropriate standard of review.

114. Prior to *Bixby*, few rights had actually been recognized as being entitled to independent review under the *Standard Oil-Drummey* rule. The rule was applied to the right to continue the practice of one's profession in the leading case of Drummey v. State Bd. of Funeral Directors, 13 Cal. 2d 75, 87 P.2d 848 (1939). Many of the decisions on the scope of review of administrative findings involved the revocation or denial of professional licenses. The courts have consistently refused to grant an independent review of the evidence to a mere applicant for a license. *See, e.g.*, Southern Cal. Jockey Club, Inc. v. California Horse Racing Bd., 36 Cal. 2d 167, 175, 223 P.2d 1, 6 (1950); McDonough v. Goodcell, 13 Cal. 2d 741, 91 P.2d 1035 (1939); Akopiantz v. Board of Medical Examiners, 146 Cal. App. 2d 331, 334 n.4, 304 P.2d 52, 55 n.4 (1956). Likewise, an applicant for old age or other welfare benefits does not have a vested right to these benefits, only the right to apply for them. Bertch v. Social Welfare Dep't, 45 Cal. 2d 524, 289 P.2d 485 (1955); Taylor v. Martin, 28 Cal. App. 3d 1057, 105 Cal. Rptr. 211 (1972). Other rights which have been recognized as vested within the meaning of the *Standard Oil-Drummey* rule are: the right of an applicant to unemployment insurance (Thomas v. California Employment Stab. Comm'n, 39 Cal. 2d 501, 247 P.2d 561 (1952)); the pecuniary interest of the unemployment insurance applicant's employer against whose account any payments to the applicant will be credited (Chrysler Corp. v. California Employment Stab. Comm'n, 116 Cal. App. 2d 8, 253 P.2d 68 (1953)); the right of a property owner not to have his land rezoned after he has started construction or incurred liabilities in reliance on an earlier permit (Trans-Oceanic Oil Corp. v. City of Santa Barbara, 85 Cal. App. 2d 776, 194 P.2d 148 (1948)); the right of a property owner to continue a formerly approved land use after a change in the zoning ordinance as long as that use is otherwise legal (Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14 (1930)).

115. 11 Cal. 3d at 47-48, 55, 520 P.2d at 42, 47, 112 Cal. Rptr. at 818, 823 (Burke, J., dissenting); Bixby v. Pierno, 4 Cal. 3d at 153-54, 159, 481 P.2d at 258-59, 263, 93 Cal. Rptr. at 250-51, 255 (Burke, J., dissenting).

One noteworthy result of *Strumsky* is that the procedural steps for review of administrative decisions in cases brought pursuant to section 1094.5 of the California Code of Civil Procedure[116] are now uniform.[117] If the petitioner alleges that there has been an abuse of discretion in that the findings are not supported by the evidence, the court must first determine whether the agency's decision substantially affects a fundamental vested right.[118] This must be done on a case-by-case basis. This initial determination will indicate which test must be used in reviewing the evidence.

If the court makes an independent judgment on the evidence, it must follow the procedure of a trial court in any civil action and prepare written findings of fact and conclusions of law if so requested by a party.[119] However, when the proceedings are governed by the substantial evidence test (*i.e.*, the trial court has a solely appellate role), written findings are not required.[120] Finally, in an an appellate review of the trial court's decision on the correctness of an administrative order, the proper scope of review of the findings of fact will always be the substantial evidence test.[121]

The supreme court in *Bixby* stressed that, even when the substantial evidence test is used, the trial court is still required to examine the

116. For an explanation of section 1094.5, see note 36 & accompanying text *supra*. Actions brought pursuant to this statute are referred to as administrative mandamus actions.

117. The only exception is the small group of constitutional agencies which the supreme court specifically excluded from the rule in *Strumsky*. The trial court's review of these agencies' findings will always be limited to the substantial evidence test. 11 Cal. 3d at 36, 520 P.2d at 34, 112 Cal. Rptr. at 810. See note 20 *supra*.

118. 4 Cal. 3d at 144, 481 P.2d at 252, 93 Cal. Rptr. at 244.

119. DEERING, *supra* note 1, § 14.2 (Supp.); *see* CAL. CODE CIV. PROC. §§ 632, 634 (West Supp. 1975).

120. Savelli v. Board of Medical Examiners, 229 Cal. App. 2d 124, 131, 40 Cal. Rptr. 171, 175 (1964). *Contra*, Beloin v. Blankenhorn, 97 Cal. App. 2d 662, 664, 218 P.2d 552, 554 (1950). Deering concludes that *Savelli* presents the correct view in that the *Beloin* court relied on a case in which the independent judgment test was used. Further, the action in *Beloin* was a traditional mandamus action, not an action brought pursuant to section 1094.5. DEERING, *supra* note 1, § 14.3. Deering suggests, however, that in the occasional substantial evidence case in which the court makes an independent judgment on a specific issue (*e.g.*, a constitutional issue), written findings should be made. *Id.* § 14.3 (Supp.).

One post-*Strumsky* decision has suggested that *Strumsky* might alter this rule. In *Friends of Lake Arrowhead v. Board of Supervisors*, the court followed *Savelli* in holding that since the substantial evidence test had been used, the trial court was not required to make written findings. 38 Cal. App. 3d 497, 518, 113 Cal. Rptr. 539, 552 (1974). However, the court suggested that, in view of the recent *Strumsky* decision, the trial court should make written findings in all cases so that an appellate court could determine which test the trial court had used and the ground upon which it selected that test. *Id.* at 518 n.17, 113 Cal. Rptr. at 552-53 n.17.

121. See note 36 *supra*.

sufficiency of the evidence in light of the *whole* record.[122] Thus, the majority countered the argument that the *Bixby* rule would create too much work for the trial court with this comment: "Once we have imposed the obligation upon the trial court to reveiew the entire record, the additional duty of deciding the matter on the basis of an independent judgment does not entail a significantly more serious burden."[123] Thus, under either standard of review, the appealing party is entitled to a full judicial consideration of the hearing record.

Post-Bixby Decisions

At the appellate level, there have been relatively few cases in which the rule of *Bixby* has been an issue. In *Jones v. City Council*,[124] the petitioner sought a writ of mandamus to compel revocation of a special use permit granted to another landowner. The appellate court affirmed the trial court's application of the substantial evidence test to the administrative findings, because the petitioner could not be said to have any fundamental vested right in the manner in which a neighboring landowner uses his property.[125] In *Toczauer v. State Board of Registration for Professional Engineers*,[126] the petitioner was an applicant for an industrial engineer's license. He argued that, since section 6767.5 of the California Business and Professional Code entitles applicants to apply prior engineering experience toward the requirements

122. 4 Cal. 3d at 143 n.10, 481 P.2d at 251 n.10, 93 Cal. Rptr. at 243 n.10. Section 1094.5(c) of the Code of Civil Procedure specifies that the trial court must look to the whole record in applying the substantial evidence test. *See* CAL. CODE CIV. PROC. § 1094.5(c) (West Supp. 1975). The earlier decisions reveal that the courts in fact were using the "isolation test"; *i.e.*, reviewing only that evidence that supported the agency's findings and determining its sufficiency apart from any detracting evidence in the rest of the record. Netterville, *The Substantial Evidence Rule in California Administrative Law*, 8 STAN. L. REV. 563, 575-83 (1956). In 1970, the supreme court noted the confusion over the scope of the substantial evidence test (*see* LeVesque v. Workmen's Comp. App. Bd., 1 Cal. 3d 627, 637, 463 P.2d 432, 438-39, 83 Cal. Rptr. 208, 214-15 (1970) (workmen's compensation cases)), and declared that the isolation approach should not be used in applying the test to the decisions of constitutional agencies (*id.*; Boreta Enterprises, Inc. v. Department of Alcoholic Bev. Control, 2 Cal. 3d 85, 94, 465 P.2d 1, 7, 84 Cal. Rptr. 113, 119 (alcoholic beverage license cases)). In *Bixby*, the court indicated that, in *all* proceedings brought pursuant to 1094.5 in which the substantial evidence test is used, the court must examine the findings in light of the *whole* record.

123. 4 Cal. 3d at 143 n.10, 481 P.2d at 251 n.10, 93 Cal. Rptr. at 243 n.10. For a discussion of the difference between the two standards of review, see Netterville, *supra* note 100, at 277-80. Very simply, when the substantial evidence test is applied, the trial court only decides whether the findings are reasonable in light of the record, whereas, when the independent judgment test is applied, the court can overrule reasonable findings if it concludes that the findings are not correct.

124. 17 Cal. App. 3d 724, 94 Cal. Rptr. 897 (1971).

125. *Id.* at 728-29, 94 Cal. Rptr. at 899.

126. 20 Cal. App. 3d 1067, 98 Cal. Rptr. 211 (1971).

for a license, his prior experience gave him a vested right to a license. The appellate court held that the trial court appropriately applied the substantial evidence test because the petitioner was seeking a right that he did not yet possess. In *Power v. State Personnel Board*,[127] the petitioner, a state employee, sought to compel the board to conduct a hearing on his request to file charges against a fellow employee. California Government Code section 19583.5[128] gives the board discretion in accepting charges by one employee against another. The court found that there is no statutory or constitutional authority for such a hearing and certainly no fundamental vested right to a hearing under the authority of *Bixby*. The cases illustrate that capricious claims to a fundamental vested right may arise under the inexplicit language of *Bixby*.

By contrast, *C.V.C v. Superior Court*[129] demonstrates how the rule in *Bixby* can protect the individual's right in a situation where existing statutory safeguards are inadequate. The county department of social services had placed a child with the petitioners for a trial period before a formal petition for adoption was to be filed. On the basis of a report that the husband was being treated for alcoholism, the department terminated the placement without an investigation of the husband's condition, and without a hearing, as permitted by the relevant statutory provisions.[130] The court, applying the Bixby standard of weighing the impact of the agency's decision on the individual, held that the petitioners, as prospective parents, had a fundamental vested right to the custody of the child whom they wished to adopt:

> Gain of a child for adoption fufills the prospective parents' most cherished hopes. The event marks the onset of a close and meaningful relationship. The emotional investment does not await the ultimate decree of adoption. Love and mututal dependence set in ahead of official cachets, administrative or judicial.[131]

The court concluded that, irrespective of the statutory provisions, the placement could not be terminated without due process notice and a hearing. Further, although the action had been brought by the traditional writ of mandamus under section 1085 of the Code of Civil Procedure, rather than by administrative mandamus under section 1094.5, the court held that the trial court should have made an independent judgment on the evidence because a fundamental vested right was af-

127. 35 Cal. App. 3d 274, 110 Cal. Rptr. 698 (1973).

128. CAL. GOV'T CODE § 19583.5 (West 1963).

129. 29 Cal. App. 3d 909, 106 Cal. Rptr. 123 (1973).

130. According to section 224(n) of the Civil Code, an adoption placement may be terminated prior to the filing of a petition for adoption without a hearing. There is no provision for judicial review of the termination. *See* CAL. CIV. CODE § 224(n) (West Supp. 1975).

131. 29 Cal. App. 3d at 916, 106 Cal. Rptr. at 128 (footnotes omitted).

fected.[132] In reaching this result, the court gave a liberal construction to the *Bixby* rule, extending it to actions other than section 1094.5 proceedings and applying it to a local agency even before *Strumsky* was decided.[133]

A possible procedural difficulty with the *Bixby-Strumsky* rule is raised in *Northern Inyo Hospital v. Fair Employment Practice Commission*.[134] The FEPC found that the appellant hospital had practiced racial discrimination in not rehiring a Native American employee who had taken a medical leave of absence. The trial court made an independent judgment on the evidence and reversed the commission's decision. The appellate court, in a split decision, held that the hospital did not have a fundamental vested right to establish its own employment practices and that, applying the substantial evidence test, the lower court should have sustained the commission's findings.[135] The majority acknowledged that the employee had a fundamental vested right to her job, but concluded that since the agency had found in her favor at the hearing, her right was not substantially affected at the trial court level. If the FEPC's decision had been unfavorable to her, the court would have considered the use of the independent judgment standard on the ground that her fundamental vested right was affected.[136]

The dissenting judge objected to making the scope of judicial review depend on which party appeals the agency's decision.[137] Of course, this situation could only arise when the agency is settling a dispute between two parties and the losing party then brings an action in superior court against the agency. The result reached in *Northern Inyo Hospital* is not mandated by either *Bixby* or *Strumsky*. Both opinions state the test for determining the scope of judicial review in general terms of whether the agency's decision "substantially affects a fundamental vested right."[138] There is no language in either case to support the contention that the rule is inapplicable if the individual hav-

132. *Id.* at 918-20, 106 Cal. Rptr. at 129-31.

133. *Id.* at 919 n.13, 106 Cal. Rptr. at 130 n.13. This case is discussed in Note, *C.V.C. v. Superior Court: Court Versus Adoption Agency Control of Agency Adoptions Before a Petition for Adoption is Filed*, 26 HASTINGS L.J. 312 (1974). Although the court did not raise the question, the author points out that the right of the prospective parents to keep a child who has been placed with them may be considered "vested." Before a child is placed with a family, the parents must be evaluated and approved by the agency. It is presumed that a placement will culminate in adoption. Successful placement is not regarded as a prerequisite to the right to adopt. *Id.* at 331-33.

134. 38 Cal. App. 3d 14, 112 Cal. Rptr. 872 (1974).

135. *Id.* at 23-26, 112 Cal. Rptr. at 878-80.

136. *Id.* at 23 n.9, 112 Cal. Rptr. at 878 n.9.

137. *Id.* at 26-28, 112 Cal. Rptr. at 880-82 (Kaufman, J., dissenting).

138. 11 Cal. 3d at 32, 44, 520 P.2d at 31, 40, 112 Cal. Rptr. at 807, 816; *accord*, Bixby v. Pierno, 4 Cal. 3d 130, 143-44, 481 P.2d 242, 251, 93 Cal. Rptr. 234, 243.

ing a fundamental vested right prevails at the administrative hearing. Nor is there any reason to assume that the supreme court intended the scope of review to be determined even in part by which party brings the appeal. The majority opinion in *Northern Inyo Hospital* is an unfortunate interpretation of the *Bixby* rule which should not be followed by other courts.[139]

These decisions suggest that, although some frivolous claims to a fundamental vested right may be encouraged by *Bixby*, the courts do not have difficulty in applying the supreme court's broad definition of that concept. Nor are the courts seizing the wide discretion given them by *Bixby* to overturn administrative decisions. Indeed, in the period between *Bixby* and *Strumsky* a fundamental vested right was recognized in only one "new" situation, a clearly appropriate decision regarding the rights of prospective adoptive parents.[140]

Post-Strumsky Decisions

The supreme court's decision in *Strumsky* to extend the *Bixby* rule to local agencies affects a large number of decisions which heretofore were reviewed by the substantial evidence test.[141] Whether there will be an inordinate increase in the number of appeals by individuals hoping to obtain a de novo judgment on the evidence remains to be seen.[142] Already, however, the appellate courts are applying the rule with vigor and mixed results.

139. The absurdity of the majority's approach is evidenced even by the official case name, which cites the employee as the real party in interest.

140. See text accompanying notes 129-33 *supra*.

141. Justice Burke lists the following local agencies whose activities could be affected by *Strumsky*: "city councils, boards of trustees, school boards, boards of freeholders, charter revision commissions, zoning boards, planning commissions, variance boards, appeals boards under building codes, fire and police appeals boards, pension and retirement boards, civil service and merit systems boards and commissions, civic parade boards, business licensing boards, parks and playgrounds boards, recreation commissions, animal shelter boards, zoo boards, library boards and many others." 11 Cal. 3d at 46 n.1, 520 P.2d at 41 n.1, 112 Cal. Rptr. at 817 n.1 (Burke, J., dissenting). Other important local agencies are the departments of social services, public health departments, and public housing authorities. For a sample list of local agencies found in the city and county governments of Los Angeles, see DEERING, *supra* note 1, App. B, at 397-98.

142. The holding in *Strumsky* that the trial court may make an independent judgment on the evidence when there is a dispute between the individual and the agency over which of two benefits he should receive could inspire numerous appeals, especially if it is applied to agencies other than retirement boards. For a discussion of this holding, see text accompanying notes 91-99 *supra*. As yet, there have been no appellate decisions on this point.

The Right to Continued Public Employment

Several post-*Strumsky* decisions have held that the right to continue in public employment is a fundamental right.[143] In *Perea v. Fales*,[144] the petitioner sought a writ of mandate to set aside a city personnel board decision suspending him for conduct unbecoming a police officer. The trial court heard the case before *Strumsky* was decided, and therefore applied the substantial evidence test in denying the writ. The appellate court, considering the case in view of *Strumsky*, first found that the right to continued employment was fundamental on two grounds: the petitioner had been deprived of property by the loss of five days' salary; and the record of suspension could affect his future career. The court further determined that this right was vested by virtue of a city regulation providing that a city employee cannot be suspended except for cause.[145] The case was remanded with directions to the trial court to make an independent judgment on the evidence.[146]

The same result was reached in *Valenzuela v. Board of Civil Service Commissioners*.[147] The court held that keeping a civil service position is not a privilege, but a fundamental right that is vested by statute.

> Hence permanent employment within the classified civil service of the City of Los Angeles is vested in the sense that one may not be removed from employment except for cause and after notice and a hearing, just as one's professional license may not be revoked or suspended except for cause and after notice and a hearing.[148]

The court also relied on the *Bixby* definition of "fundamental," stressing the economic and personal repercussions that the loss of the security of a civil service position would entail.[149]

The Right of a Probationary Teacher to be Rehired

The right of a probationary teacher to be rehired was found to

143. This issue was not decided before *Strumsky* extended the fundamental vested right rule to local agencies because the California State Personnel Board is a constitutional agency whose decisions are always reviewed by the substantial evidence test. CAL. CONST. art. XXIV, §§ 2-3; Boren v. State Personnel Bd., 37 Cal. 2d 634, 637-38, 234 P.2d 981, 983 (1951). There was thus no reason to determine whether state civil service employees have a fundamental vested right to their position.

144. 39 Cal. App. 3d 939, 114 Cal. Rptr. 808 (1974).

145. *Id.* at 941-42, 114 Cal. Rptr. at 809-10.

146. The supreme court indicated in *Strumsky* that its decision would apply to all pending and future proceedings in superior court and all pending and future appeals. 11 Cal. 3d at 45, 520 P.2d at 40, 112 Cal. Rptr. at 816.

147. 40 Cal. App. 3d 557, 115 Cal. Rptr. 103 (1974).

148. *Id.* at 565, 115 Cal. Rptr. at 108.

149. *Id.* Another decision in which the right to continue in public employment was held to be fundamental and vested is Rigsby v. Civil Service Comm'n, 39 Cal. App. 3d 696, 115 Cal. Rptr. 490 (1974). The court did not set forth its rationale for finding that the requirements of the *Strumsky* test had been met.

be fundamental and vested in *Young v. Governing Board.*[150] The court held that such a teacher, although not a tenured employee, has a vested right under section 13443 of the California Education Code, which provides that a probationary teacher shall be rehired unless there is a showing of cause not to rehire relating solely to the welfare of the school and the pupils.[151] The court observed that failure to be rehired would blot the teacher's professional record. "Thus it meets another *Bixby* test in that the interest has an important aspect to it and in human terms is very viable [*sic*] to the individual in his life situation."[152]

The same right was also recognized in *Pendray v. Board of Trustees.*[153] In applying the rule in *Strumsky* to section 13443 of the California Education Code, the court found that statute to be in violation of the state constitution. The petitioner probationary teacher had not been rehired by the local school board after it found his conduct—unauthorized, off-campus drug counseling of students—to be unprofessional. The trial court, applying the substantial evidence test, ruled that the evidence supported the findings and that these findings, the stated causes for dismissal, were related to the welfare of the school and pupils.[154] The appellate court, however, held that a probationary teacher has a fundamental vested right to his position and that therefore the trial court should have applied the independent judgment test.[155]

The trial court further stated that it did not have the power to consider whether the findings of fact supported the board's decision to dismiss.[156] The appellate court disagreed. Section 13443 of the California Education Code provides that "the determination of the governing board as to the sufficiency of the cause pursuant to this section *shall be conclusive* . . . ."[157] The court interpreted this language to mean that the legislature had given the school board a power of determination "totally beyond the reach of the courts . . . ."[158] The court con-

150. 40 Cal. App. 3d 769, 115 Cal. Rptr. 456 (1974).

151. CAL. EDUC. CODE § 13443 (West 1975).

152. 40 Cal. App. 3d 769, 780, 115 Cal. Rptr. 456, 463 (1974). *But see* Burgess v. Board of Educ., 41 Cal. App. 3d 571, 116 Cal. Rptr. 183 (1974). In the latter case, the respondents probationary teachers appealed the board's decision to dismiss them because of a decline in school enrollment (as permitted by section 13447 of the California Education Code). Both parties agreed that the trial court had correctly chosen the substantial evidence test as the standard of review and the issue of a fundamental vested right to continued employment was not discussed. *Id.* at 574, 116 Cal. Rptr. at 185.

153. 42 Cal. App. 3d 341, 116 Cal. Rptr. 695 (1974).

154. Section 13443(d) of the Education Code provides that dismissal of a probationary teacher shall be for cause only and "the cause shall relate solely to the welfare of the schools and the pupils thereof . . . ." CAL. EDUC. CODE § 13443(d) (West 1975).

155. 42 Cal. App. 3d at 350, 116 Cal. Rptr. at 701.

156. *Id.* at 346, 116 Cal. Rptr. at 698.

157. CAL. EDUC. CODE § 13443(d) (West 1975) (emphasis added).

158. 42 Cal. App. 3d at 347, 116 Cal. Rptr. at 698.

cluded that, pursuant to *Strumsky*, this would be an exercise of judicial power by an administrative agency in violation of the state constitution.[159] The petitioner was therefore entitled to judicial review by the trial court of the question of whether the findings supported the board's decision.

This is a novel application of the *Bixby-Strumsky* rule. *Bixby* and *Strumsky*, as well as all of the earlier cases in the *Standard Oil* line, were concerned solely with the question of whether the evidence supported the findings of fact. The role of a trial court in reviewing the sufficiency of an agency's findings to support its decision is set forth in section 1094.5(b) of the Code of Civil Procedure. The statute specifically authorizes the trial court to find a prejudicial abuse of discretion if the administrative decision is not supported by the findings.[160] Section 13443(d) of the Education Code and section 1094.5(b) of the Code of Civil Procedure are thus in conflict as to the role of the trial court in this respect. Although the *Strumsky* opinion does not discuss this step in the trial court's reviewing process, the holding that a local agency cannot exercise judicial power supports the *Pendray* court's conclusion that section 13443 of the Education Code violates the constitution by giving the local board final power to determine whether its findings support a decision to dismiss a probationary teacher.[161]

The appellate courts in these cases involving the dismissal of a public employee consistently have ordered the trial court to make an independent judgment on the evidence whenever the employee alleges an abuse of discretion in the findings of fact. Certainly any person facing unemployment will desire a judicial re-examination of the evidence and many such appeals to the superior courts may be expected.

The Right to Continued Welfare Benefits

One appellate court in *Le Blanc v. Swoap*[162] has determined that the right to continue receiving welfare benefits is a fundamental vested right. Following *Goldberg v. Kelly*,[163] the California Supreme Court

159. *Id.* at 350-51, 116 Cal. Rptr. at 701. The court did not specifically mention article VI, section 1, which vests all judicial power in named courts and is the basis for the *Strumsky* decision. See text accompanying notes 52-61 *supra*. The court referred instead to a constitutional right to an independent judicial review, as created by *Strumsky*. Presumably, the court followed the *Strumsky* rationale as to article VI, section 1; *i.e.*, that an agency cannot exercise judicial power without express authorization from another provision of the constitution.

160. CAL. CODE CIV. PROC. § 1094.5(b) (West 1955).

161. *Pendray* has been granted a hearing by the California Supreme Court. Pendray v. Board of Trustees, 42 Cal. App. 3d 341, 116 Cal. Rptr. 695 (1974), *hearing granted*, No. S.F. 23234 (Dec. 11, 1974).

162. 42 Cal. App. 3d 1016 (1974), *rehearing granted* (Dec. 6, 1974).

163. 397 U.S. 254 (1970).

recognized that a welfare recipient has a constitutional right to notice and an evidentiary hearing before his benefits may be terminated by the agency.[164] However, the question of whether the recipient has a fundamental vested right to benefits and therefore is entitled to an independent judgment on the evidence by a trial court had not been decided before this case.

The petitioner in *Le Blanc* had been receiving Aid to the Totally Disabled for physical and psychiatric disorders, until the local department of social services determined at a hearing that she was capable of employment. The trial court applied the substantial evidence test in reviewing the agency's decision and reversed the order to terminate benefits. The court of appeal affirmed but held that the trial court should have reweighed the evidence and made an independent determination of the facts. The court relied on the language of *Bixby* and *Strumsky* in finding a fundamental vested right. "Welfare benefits, such as A.T.D., are essential to respondent in her life situation. Termination of aid to an eligible recipient deprive her of the very means of her survival and her situation becomes immediately desperate."[165] The court noted, however, that its decision does not change the established rule that the *applicant* for welfare benefits does not have a vested right and therefore a denial of a new application for aid does not warrant the stricter standard of review.[166]

Le Blanc is consistent with the rationale of *Bixby* and *Strumsky* and follows the current judicial policy of protecting the rights of the welfare recipient. It should be noted, however, that because this decision has been granted a rehearing,[167] it has no precedential value at this time.

Procedural Problems

Other post-*Strumsky* decisions have been concerned with the type of proceedings to which *Strumsky* is applicable and with the still uncertain treatment of those agencies which may be classified as both "local" and "constitutional." The rule in *Strumsky* is stated in reference to proceedings brought pursuant to section 1094.5 of the Code of Civil

164. McCulloch v. Terzian, 2 Cal. 3d 647, 470 P.2d 4, 87 Cal. Rptr. 195 (1970).

165. 42 Cal. App. 3d 1016, 1020 (citations omitted).

166. *Id.* See note 114 *supra.* It should be noted that this court misstated the substantial evidence test. The court said that in applying the substantial evidence test, the trial court must ignore any evidence contrary to the evidence supporting the agency's findings. 42 Cal. App. 3d at 1021. In *Bixby*, the supreme court rejected this "isolation test" and held that in all cases in which the substantial evidence test is applied, the trial court must regard the evidence in light of the *whole record.* See note 122 & accompanying text *supra.*

167. 42 Cal. App. 3d 1016 (1974), *rehearing granted* (Dec. 6, 1974).

Procedure. The court did not specifically extend the rule to appeals brought pursuant to other statutory authority.

In *People v. Gates*[168] the court held that *Strumsky* did not apply to a superior court proceeding in which the plaintiff county sought an injunction to enforce an administrative decision. An action to abate a nuisance was brought pursuant to a county ordinance providing that the board of supervisors may, upon recommendation of the planning commission, order a property owner to terminate a nonconforming use, and that failure to comply with such an order is a public nuisance. The court found that, under this statutory procedure, the nuisance action was an original action brought by the board to enforce the planning commission's devision. *Strumsky* was thus inapplicable because "The case at bar does not involve a review of an administrative decision."[169] However, as this meant that the trial court was the court of original jurisdiction, it was necessarily required to weigh the evidence and make an independent judgment.[170]

In *Hunt-Wesson Foods, Inc. v. County of Alameda*,[171] the court took the position that *Strumsky* should apply to all appeals of local administrative decisions, regardless of how they reach superior court. The petitioner had paid taxes under protest, and pursuant to section 5103 of the California Revenue and Taxation Code, filed a suit in superior court for a review of the findings of the county assessment appeals board. The trial court had assumed that authority to make an independent judgment on the evidence could be found in section 1606.5 of the Revenue and Taxation Code;[172] the appellate court rejected this argument. The appellate court then considered the impact of *Strumsky* on determining the proper scope of review. The court decided that the *Bixby-Strumsky* rule was not limited to actions brought pursuant to section 1094.5 of the Code of Civil Procedure and could be applied to administrative appeals brought pursuant to other stat-

168. 41 Cal. App. 3d 590, 116 Cal. Rptr. 172 (1974). The California Supreme Court had granted a petition for a hearing and then transferred the case to the appellate court for reconsideration in light of *Strumsky*.

169. *Id.* at 606, 116 Cal. Rptr. at 182.

170. *Id.* at 605-06, 116 Cal. Rptr. at 182-83.

171. 41 Cal. App. 3d 163, 116 Cal. Rptr. 160 (1974).

172. *Id.* at 171-72, 116 Cal. Rptr. at 164-65. The trial court had assumed that authority to make an independent judgment on the evidence could be found in section 1605.5 of the Revenue and Taxation Code. *Id.* at 164-65, 116 Cal. Rptr. at 162. This statute provides for the right to a hearing before a county assessment appeals board. A 1968 amendment added the following language: "At the hearing the final determinations by the board shall be supported by the weight of the evidence." CAL. REV. & TAX. CODE § 1605.5 (West 1970). The appellate court held that this amendment did not give the trial court authority to reweigh the evidence when reviewing the board's decision. 41 Cal. App. 3d at 171-72, 116 Cal. Rptr. at 164-65.

utes.[173] It concluded, however, that *Strumsky* did not apply in this case because the assessment appeals board is a local agency of constitutional origin. The trial court had therefore erred in making an independent judgment on the evidence; it should have applied the substantial evidence test.[174]

The appellate court carefully explained its determination that the assessment appeals board was a constitutional agency. Article XIII, section 9 of the California Constitution provides that county boards of supervisors shall serve as the boards of equalization and shall have the power to determine property values for county taxation purposes. These boards have been held to be constitutional agencies with the consequent authority to make findings of judicial weight.[175] The status of county assessment appeals boards as agencies of constitutional origin is not as clear. Section 9.5 of article XIII gives the county boards of supervisors the authority to establish by local ordinance assessment appeals boards which will serve as the board of equalization. Arguably, then, these boards are created by the local legislative action, not by the constitution. The court in *Hunt-Wesson Foods* decided that since these boards are given the same powers as county boards of supervisors serving as equalization boards under article XIII, section 9, they too should be considered to be constitutional agencies.[176] The court admitted that it felt compelled to reach this conclusion so that the scope of review would be consistent with respect to both kinds of county tax boards.[177]

Moreover, given the substantial impact upon the property tax sys-

173. 41 Cal. App. 3d at 172-73, 116 Cal. Rptr. at 165-66. *C.V.C. v. Superior Court*, a post-*Bixby* decision reviewing the order of a state agency, also held that the rule in *Bixby* was not limited to administrative mandamus proceedings. The court applied the rule in a traditional mandamus proceeding brought pursuant to section 1085 of the Code of Civil Procedure. 29 Cal. App. 3d 909, 918-19, 106 Cal. Rptr. 123, 129-30 (1973). See text accompanying notes 129-33 *supra*.

174. The substantial evidence test is always used to review the decisions of a constitutional agency. See note 117 *supra*.

175. Flying Tiger Line, Inc. v. County of Los Angeles, 51 Cal. 2d 314, 320-22, 333 P.2d 323, 326-27 (1958); Universal Consol. Oil Co. v. Byram, 25 Cal. 2d 353, 356-57, 362, 153 P.2d 746, 748-49, 751-52 (1944). More recently, in *Westlake Farms, Inc. v. County of Kings*, the court said that, even if it assumed that the right to recover taxes under protest was fundamental, the substantial evidence test was properly applied because the county board of equalization is a constitutional agency. 39 Cal. App. 3d 179, 183-85, 114 Cal. Rptr. 137, 138-40 (1974).

176. 41 Cal. App. 3d at 175-76, 116 Cal. Rptr. at 167-68. The court correctly assumed that the classification of county assessment appeals boards is an open question. One court has held that these boards are distinct constitutional agencies, separate from the county boards of supervisors. Los Angeles County v. Tax Appeals Bd., 267 Cal. App. 2d 830, 834, 73 Cal. Rptr. 469, 471 (1968). However, Deering lists these boards as local agencies. DEERING, *supra* note 1, App. B, at 398.

177. 41 Cal. App. 3d at 175 n.5, 116 Cal. Rptr. at 168 n.5.

> tem that change in the standards of judicial review might create, this court is reluctant as an intermediate appellate court [to] effect a change in the scope of review of a constitutional agency.[178]

These post-*Strumsky* cases indicate that the courts are being reasonable and restrained in recognizing new rights as fundamental and vested. They also reveal that uncertainties still exist after *Strumsky* as to the proper scope of review of local agencies' decisions. Clarification by the supreme court is needed on the status of county assessment appeal boads and other local agencies which may be of constitutional origin. The question of the applicability of *Strumsky* to statutory remedies other than section 1094.5 of the Code of Civil Procedure is also still unanswered. The supreme court has not completed the task of bringing a consistent, clear approach to the scope of judicial review of administrative decisions in California.

Conclusion

Strumsky is an unwieldy opinion. Justice Sullivan charted a narrow course through the California Constitution in an effort to stay within the confines of a much criticized line of earlier cases. Recent appellate decisions illustrate that there are still procedural quirks and questions in applying the fundamental vested right concept. Nevertheless, the *Bixby-Strumsky* rule provides a flexible tool for judicial protection of the individual who must contend with an administrative decision which vitally affects his life. The California Supreme Court stands alone in its implicit recognition that, regardless of the extent of due process afforded by an administrative hearing, that trier of fact is still an adversary.[179]

Safeguarding the right to an independent judicial review of the evidence is especially important at the local level, where there is no regulatory legislation comparable to the Administrative Procedure Act for state agencies.[180] Closer scrutiny of local agencies is required be-

178. *Id.* at 176, 116 Cal. Rptr. at 168-69. In contrast, in *Domenghini v. County of San Luis Obispo*, in which the petitioner had paid taxes under protest and then appealed to the superior court for relief, both parties stipulated that *Strumsky* was not applicable. 40 Cal. App. 3d 689, 694 n.8, 115 Cal. Rptr. 608, 612 n.8 (1974). The court does not explain whether the substantial evidence test was assumed to be appropriate because the tax appeals board is a constitutional agency or because there was no fundamental vested right at issue.

179. Even at the state level hearing, where a professional hearing officer who is not an employee of the agency is present and may preside, the Administrative Procedure Act provides that the agency is not required to adopt his recommendations. CAL. GOV'T CODE § 11517 (West Supp. 1975).

180. One commentator, noting the lack of controls over local agencies, has suggested that the safeguards provided by the Administrative Procedure Act, such as the presence of a hearing officer, should be extended to the local level. Molinari, *California*

cause the personnel are likely to be untrained in the agency's area of expertise and subject to the political pressures of a close community. The procedures and record-keeping of local agencies are often irregular. *Strumsky* could give impetus to such agencies to maintain better records and to develop rules of procedure in order to discourage challenges by judicial appeal.[181]

Perhaps *Strumsky* will result in an untoward amount of work for the superior courts. It may also be a step toward bringing greater due process protection to the individual in the proceedings of the primary decisionmakers of local government, the local administrative agencies.

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181. *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, decided by the supreme court shortly after *Strumsky*, suggests a trend by the court toward regulating the procedure of local administrative agencies. The court held that local planning commissions, in adjudicating an application for a variance, must produce a written record that contains findings of facts to support its decision and sets forth the analysis that led to these findings. 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974). The court gave several reasons for requiring written findings: section 1094.5 of the Code of Civil Procedure implies the existence of a record capable of being analytically reviewed; this requirement will insure that the commission adopts some rational process in coming to a decision; the requirement of findings will insure more vigorous judicial review and will mitigate the effect of outside pressures on the commission's decisions; and the making of a record will assure the parties and the community that the commission is acting equitably. *Id.* at 514-18, 522 P.2d at 17-19, 113 Cal. Rptr. at 840-43. While this decision was limited to the granting of zoning variances, it serves as a warning to all local administrative bodies to look more closely to their own procedural policies. The court's suggestion that the language of section 1094.5 of the Code of Civil Procedure mandates a written record of the hearing implies that the court will extend this requirement to other proceedings brought pursuant to that statute.

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